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2013 IL App (5th) 120543WC-U

Order filed December 12, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

JAMIE HEAD,)	Appeal from the Circuit Court
)	of the Second Judicial Circuit,
Appellant,)	White County, Illinois.
)	
v.)	Appeal No. 5-12-0543WC
)	Circuit No. 12-MR-8
THE ILLINOIS WORKERS' COMPENSATION)	
COMMISSION <i>et al.</i> (White County Coal,)	Honorable Thomas J. Foster,
Appellee).)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Harris, Stewart, and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment of the trial court is vacated, decision of the Commission vacated, and the cause is remanded to the Commission for further proceedings where the Commission's findings of fact and law were insufficient to allow the appellate court to adequately review the Commission's decision.

¶ 2 The claimant, Jamie Head, a 29-year-old coal miner, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004))

seeking benefits for an injury to his right leg on October 13, 2006. On that date, while employed by White County Coal (employer), a cable malfunctioned and trapped the claimant's right leg against a piece of heavy machinery. He was subsequently diagnosed with an acute crush injury of the right leg.

¶ 3 Following a hearing on April 13, 2011, an arbitrator found that the claimant was unable to return to his former employment as a coal miner and awarded a wage differential benefit of \$355.46 per week beginning April 13, 2011, pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2004). The arbitrator also awarded maintenance benefits for 222 weeks from October 13, 2006, until April 13, 2011, and ordered the employer to pay for the services of Delores Gonzalez, a vocational rehabilitation counselor. In addition, the arbitrator determined that the employer had unreasonably and vexatiously delayed or denied payment of benefits and awarded penalties and attorney fees pursuant to sections 16, 19(k), and 19(l) of the Act. 820 ILCS 305/16, 19(k), 19(l) (West 2004).

¶ 4 The employer appealed to the Illinois Workers' Compensation Commission (the Commission) which affirmed and adopted the arbitrator's finding that the claimant could not return to his previous occupation as a coal miner. The Commission, however, vacated the wage differential award and instead awarded the claimant 17.5% loss of the person as a whole pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2004). The Commission found that the claimant had reached maximum medical improvement (MMI) on November 10, 2009. It therefore found that the claimant was entitled to temporary total disability (TTD) benefits up to that date and vacated the arbitrator's award of maintenance benefits. The Commission also vacated the award of vocational rehabilitation expenses charged by Delores Gonzalez, finding the

amount of charges to be unreasonable. Further, the Commission vacated the award of penalties and attorney fees, finding that there was a reasonable dispute based upon medical opinions as to the nature and extent of the claimant's injuries.

¶ 5 The claimant sought judicial review of the Commission's decision in the circuit court of White County, which confirmed the Commission's decision. This appeal followed.

¶ 6 **FACTS**

¶ 7 The claimant suffered a crush injury to his right leg on October 13, 2006. He was airlifted to a nearby hospital from which he was discharged the following day. An examination at the time of his admission revealed substantial swelling of the right calf. Tests revealed no bone fractures.

¶ 8 On October 16, 2006, the claimant came under the care of his primary care physician, Dr. Richard Rethorst, who diagnosed right lower leg crush injury. Dr. Rethorst referred the claimant to Dr. Jean Houle, an orthopedic surgeon.

¶ 9 Dr. Houle examined the claimant on October 18, 2006. Examination notes indicated bruising and abrasions to the right lower leg, but no swelling or atrophy. X-rays were negative for fractures. Dr. Houle prescribed aspirin and pain medication. In a follow-up examination one month later, the claimant's leg appeared swollen. The claimant reported that, if he stood for any prolonged period, his leg would swell. Dr. Houle ordered the claimant to remain off from work and prescribed physical therapy.

¶ 10 On January 10, 2007, the claimant's right calf measured 19 inches according to Dr. Houle's report. On February 17, 2007, the claimant reported leg pain and swelling if he remained on his feet for three or more hours. Dr. Houle also noted that the claimant reported that he

shoveled snow over that weekend. On October 11, 2007, the claimant reported that his leg would swell when he was active. His right calf measurements showed a 2.5 centimeter to 3 centimeter difference when compared to that of the left calf. Dr. Houle released the claimant as having attained MMI on October 11, 2007.

¶ 11 Dr. Houle testified by evidence deposition that the claimant had suffered significant swelling secondary to the crush injury. Dr. Houle testified that the claimant had permanent restrictions that limited him to being able to stand or walk for no more than 2 hours at a time without being able to rest and elevate that leg for at least 45 minutes and no crawling, squatting, or climbing. Dr. Houle further opined that the claimant was unable to return to his former position with mining-type duties. His final diagnosis was a crush injury to the leg with resulting chronic lower leg edema. Dr. Houle testified that, when the claimant's leg swells, it places pressure on the nerve, causing numbness into the toes and foot.

¶ 12 On August 29, 2007, the claimant was evaluated at the employer's request by Dr. Michael McFaddon, a physical and rehabilitation specialist. Dr. McFaddon agreed with Dr. Houle's permanent restrictions.

¶ 13 Dr. McFaddon reexamined the claimant on January 18, 2010, after reviewing additional medical information and reviewing video surveillance. Dr. McFaddon added that the claimant should not lift greater than 50 pounds on more than an occasional basis. He based his new restrictions on his review of the surveillance video. Dr. McFaddon acknowledged that, when he saw the claimant on October 29, 2007, he had reached MMI and that the restrictions he had placed on him at that time were permanent in nature. Dr. McFaddon noted that the permanent restrictions included that the claimant could stand or walk for no more than two hours, sit down

and elevate his foot for two hours, then go back to work and stand or walk for two hours. This regime could continue, according to Dr. McFaddon, throughout the day. Dr. McFaddon admitted that further permanent work restrictions would be best defined through a functional capacity evaluation (FCE). Dr. McFaddon did not order an FCE at that time.

¶ 14 Dr. McFaddon testified by evidence deposition that, after reviewing the videotape, he concluded that the claimant was capable of performing more activities than was previously believed to be possible. Dr. McFaddon further opined that the claimant's activities depicted in the video were not consistent with the symptoms that the claimant claimed to have on a daily basis. Dr. McFaddon further testified that the entire video, about two hours in length, actually occurred over several days. He did not recall any specific elements of the video footage during his testimony but admitted that it did not show the claimant walking for more than two hours at one time, lifting weights greater than 50 pounds, or working in any capacity.

¶ 15 In October 2007, the claimant made a demand for vocational rehabilitation services. These services were never authorized by the employer. At that same time, the claimant began a self-directed job search. He testified that he graduated high school and had a few classes in college but never obtained any degree. His prior job activities were all related to manual labor, and the claimant believed that he could no longer perform any of these activities. He testified that his search included completing and submitting job applications from leads resulting from newspaper and internet searches. He testified that he only placed applications for jobs that were potentially available. He did not mark down when jobs were not available or when his search came up empty. He also testified that there were times when he would look on the internet or in the newspaper and there would be no new job postings within his restrictions. The claimant did

not produce any job search documentation at the hearing.

¶ 16 The claimant testified that he found temporary employment at a cemetery performing lawn care. He testified that this would take him approximately three hours and was done with the assistance of his wife. He also testified that his job was to mow the grounds with the use of a riding lawnmower. When he performed these activities, he elevated his leg and would take breaks if his leg began to swell. He performed this job for five months during the spring and summer of 2008 and was paid \$9.25 per hour for the three hours of work per week. The claimant also testified that he inquired regarding full-time employment, but the cemetery did not have a position available.

¶ 17 In the fall of 2008, the claimant was able to find a job with his uncle who owned Logan Line Dozer. This was also a seasonal position during which the claimant worked 20 to 30 hours per week, depending upon the weather. He testified that he was paid \$10 per hour and that his job activities included driving the tractor. He also testified that, while driving the tractor, there were times when his leg would begin to swell and he would elevate it while on the tractor to reduce the pain. He also noted that, when his leg problems worsened, his uncle would permit him to leave work early. The claimant also testified that, when the season ended, he became unemployed again.

¶ 18 In September 2008, the claimant hired Delores Gonzalez, a vocational specialist, for a vocational rehabilitation assessment. Gonzalez assisted the claimant in producing a resume, as well as coaching him with interviewing skills. The claimant testified that Gonzalez provided job leads, as well as assisted him with follow-ups after the interviews. Gonzalez recommended that the claimant return to college to complete his courses. The employer did not authorize

Gonzalez's assistance nor did it offer to pay for the claimant to attend any college classes. The claimant testified that he continued his self-directed job searches throughout 2008 and 2009, online, in newspapers, and by contacting friends, family, and local businesses. He testified that he had sent resumes to the few places that had job openings and that he did have some interviews but that they did not result in any job offers. He admitted that he did not provide any job search documents to Gonzalez.

¶ 19 In November 2009, the employer discontinued the claimant's weekly benefits. The claimant testified that this dramatically affected his ability to perform job searches as he had to discontinue his internet subscription and he had problems with paying for gas to get to the job locations. In January 2010, the claimant again sought assistance from Gonzalez who made the same recommendations for further schooling. The claimant renewed his request for maintenance benefits and vocational rehabilitation services from the employer, which continued to refuse his requests.

¶ 20 In April 2010, the claimant obtained temporary employment at Dungee's Farm. He testified that he worked anywhere from 20 to 40 hours per week driving a tractor during planting season and was paid \$10 per hour. He testified that he was able to elevate his leg as needed. The seasonal job ended in June 2010. During this time, the claimant began selling some firewood, which he would split himself and deliver to various homes. He spent approximately 10 hours per week performing this activity and had no problems lifting or carrying the wood. However, if his leg began to swell, he would have to stop his activities to elevate the leg. The claimant also testified that, while he was working these temporary jobs, he reduced his number of job searches since he was working more during the day. However, he still continued to look for full-time

employment.

¶ 21 During the latter part of 2010, the claimant testified that he had job interviews at Walgreens, Lowe's, Home Depot, Menard's, Terminix, Paul Blandenberger Farm, Napa, Rent One, Rent-A-Center, and Rural King. He testified that all the jobs paid around minimum wage, and none of the interviews resulted in job offers. He did not provide any contemporaneous documentation regarding these job applications or interviews. The claimant further testified that, as part of his interview with Walgreens, he was asked to undergo an FCE to determine his level of physical capabilities. As a result, in September 2010, the claimant contacted Dr. Houle, who ordered an FCE. Following completion of the FCE, Dr. Houle reiterated his original work restrictions.

¶ 22 The claimant testified that the main problem with his leg occurred when he stood or walked for more than one to two hours at a time. He also testified that, if he stood or walked for too long, his leg would begin to swell, which then caused his entire foot to go numb and become painful. When his leg became swollen, he had problems standing, lifting, or climbing. He further testified that he had fallen several times when the leg was swollen, and the only way to reduce the swelling was to stop working and elevate the foot. He also testified that, when his leg is not swollen, he can perform all of the activities associated with standing and lifting and can even jump off the back of his truck.

¶ 23 A surveillance video was entered into evidence which showed the claimant standing, walking, and jumping off of the back of a truck. The claimant testified that he could perform all of those activities when his leg is not swollen, but the problems come when the leg swells after he is standing or walking for more than an hour or two. The claimant acknowledged that, when

his leg is not swollen, he is able to drive a four-wheeler, drive his truck, and even hunt. He stated that when engaged in any such activities, however, he must limit the time he is on his leg, and he must take care to elevate his leg as often as possible. He also stated that, on several occasions, he had to cut short his hunting trips because of the fact that the leg would become stiff and painful.

¶ 24 Gonzalez testified that she assisted the claimant from March 2010 through March 2011. She further testified that as of January 7, 2011, it was her opinion that the claimant was unemployable in the open labor market. She reached that conclusion based on the FCE, the permanent work restrictions imposed by Dr. Houle, and the claimant's unsuccessful search for work. Gonzalez noted that in order for the claimant to obtain reemployment, he would have to find an employer who would accommodate the restrictions. She opined that this was unlikely since most employers have hundreds of people applying for jobs and they would be more willing to hire someone that doesn't need to be accommodated. She stated that the claimant had been motivated throughout the entire time period, and she did not tell him that he was unemployable in the open labor market because she did not want to discourage him. She also testified that, if the claimant were to find employment, it would only be at \$8.50 to \$10 per hour. Gonzalez's bill remains outstanding in the amount of \$6,624. The record indicated that Gonzalez was initially contacted by the claimant's employer for the purpose of preparing an evaluation of the claimant. After preparing her report, she had no contact with the claimant for over a year.

¶ 25 The arbitrator found that the claimant's current condition of ill-being was causally related to his work injury on October 13, 2006, and awarded TTD for the period of October 13, 2006, through April 1, 2010, and again from July 1, 2010, through April 13, 2011. The arbitrator awarded a section 8(d)(1) wage differential benefit of \$335.50 per week for the period of April 2,

2010, through June 30, 2010. The arbitrator calculated the wage differential based upon what the claimant would have earned in his former employment (\$903.26 per week) and his actual earning of \$400 per week during that period. The arbitrator also awarded a wage differential benefit of \$355.46 per week, beginning April 13, 2011, and lasting for the duration of the claimant's disability. This wage differential was based on the claimant's earnings in his prior employment (\$903.26) and the average of his potential current earnings of \$370, based upon Gonzalez's testimony that the claimant would be capable of earning between \$8.50 and \$10 per hour, if he could find employment. The arbitrator also awarded the claimant medical expenses totaling \$1,962.58, subject to the medical fee schedule. The arbitrator also awarded the claimant vocational rehabilitation expenses of \$6,624 for Gonzalez's services and imposed penalties and attorney fees for unreasonable and vexatious delay and refusal to pay those expenses.

¶ 26 The employer appealed the arbitrator's decision to the Commission. The Commission modified the award by finding that the claimant had reached MMI on November 10, 2009. The Commission found that the claimant was only entitled to TTD benefits for the period from October 14, 2006, through November 10, 2009. Moreover, the Commission questioned the validity of the claimant's search for alternative employment and found that he had not proven that he was entitled to a wage differential award. The Commission instead awarded the claimant a permanency award of 17.5% of the person as a whole. The Commission also determined that Gonzalez's fees for vocational rehabilitation services were unreasonable and denied the claim for her services. Likewise, the Commission determined that the employer had a reasonable basis to dispute payment of benefits and, therefore, declined to adopt the arbitrator's award of penalties and attorney fees.

¶ 27 The claimant sought judicial review of the Commission's decision in the circuit court of White County, which affirmed the Commission's decision. This appeal followed.

¶ 28 ANALYSIS

¶ 29 The claimant first argues that he demonstrated a loss of earning capacity and was, therefore, entitled to a wage differential award. To qualify for a wage differential award, a claimant must prove: (1) partial incapacity which prevents him from pursuing his usual and customary line of employment; and (2) an impairment of earnings. *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 759 (1995). The Commission's determination whether a wage differential award is appropriate is a question of fact which will not be overturned unless it is against the manifest weight of the evidence. *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260, 267 (1999). We conclude that the Commission did not make adequate findings to support its conclusions and that its failure to do so in this case warrants vacating the decisions of the trial court and the Commission and remanding the cause for further proceedings.

¶ 30 It is well settled that the arbitrator and the Commission are required to make findings of fact and law. *Skzubel v. Illinois Workers' Compensation Comm'n*, 401 Ill. App. 3d 263, 269 (2010); *J.S. Masonry, Inc. v. Industrial Comm'n*, 369 Ill. App. 3d 591, 598 (2006); *Illinois Bell Telephone Co. v. Industrial Comm'n*, 265 Ill. App. 3d 681, 686 (1994); *Swift & Co. v. Industrial Comm'n*, 150 Ill. App. 3d 216, 220 (1986). These findings need not be stated in any particular language and, if possible, may be implied from the Commission's decision. *Skzubel*, 401 Ill. App. 3d at 269; *J.S. Masonry, Inc.*, 369 Ill. App. 3d at 598; *Illinois Bell Telephone Co.*, 265 Ill. App. 3d at 686; *Swift & Co.*, 150 Ill. App. 3d at 221. The Commission may also satisfy the requirements that it make finding of fact and law by adopting the findings of the arbitrator. *Swift*

& Co., 150 Ill. App. 3d at 220. The rationale for requiring the arbitrator and the Commission to make findings of fact and law is to allow the reviewing court to adequately review the Commission's decision. See *Skzubel*, 401 Ill. App. 3d at 269 (citing *Reinhardt v. Board of Education of Alton Community Unit School District No. 11*, 61 Ill. 2d 101, 103 (1975)).

¶ 31 Here, we are unable to properly review the Commission's decision because it is unclear to us exactly what the Commission found. The Commission appeared to acknowledge that the claimant had presented sufficient evidence to establish that he was unable to return to his usual and customary line of employment as a coal miner, citing the FCE, Dr. Houle's treatment records, and Dr. McFaddon's opinion as to the permanent nature of his injuries. However, the Commission then found that the claimant had failed to present sufficient evidence to establish an impairment of his earnings because: (1) his testimony and supporting evidence regarding his search for alternative employment was not credible; and (2) Gonzalez's testimony regarding her invoices lacked credibility. The Commission, however, made no finding regarding Gonzalez's testimony regarding the labor market for a person with the claimant's skills and limitations.

¶ 32 We find that the Commission's determination that the claimant failed to establish impairment of his earnings based upon a lack of an appropriate job search is contrary to law. Contrary to the decision of the Commission, there is no affirmative requirement under section 8(d)(1) for a claimant to conduct a job search in order to be entitled to a wage differential benefit. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 731 (2000). While a claimant can demonstrate an impairment of earnings through a job search, the lack of a job search does not preclude a wage impairment award. *Id.* As an alternative to an actual job search, the claimant may establish impairment of earnings through vocational expert testimony regarding the earning

capacity of the claimant in the available labor market. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 831 (2002).

¶ 33 The claimant maintained that the only employment for which he was currently suited was in the \$8 to \$10 range, based upon the testimony of his vocational rehabilitation specialist, Delores Gonzalez. Our review of the record shows that Gonzalez testified that in order for the claimant to obtain employment, he would have to find an employer who would accommodate the restrictions, a prospect she believed was unlikely in the relevant labor market. She also testified that, if the claimant were to find employment, it would only be at \$8.50 to \$10 per hour. While this evidence could support the claimant's claim of earnings impairment, we find nothing in the Commission's decision to indicate that the Commission considered this evidence. Had the Commission rejected Gonzalez's testimony as lacking in credibility, we would be able to review that finding to determine whether it was against the manifest weight of the evidence. Since the Commission did not comment upon the claimant's labor market evidence introduced through Gonzalez's expert testimony we are unable to properly review the Commission's decision.

¶ 34 The employer suggests that we can infer that the Commission rejected Gonzalez's testimony regarding the available labor market because it rejected the credibility of her invoices. We disagree. It is the Commission's responsibility to make findings of fact and conclusions of law, and without express findings of fact, we cannot adequately review the Commission's decision. *Skzubel*, 401 Ill. App. 3d at 269.

¶ 35 In short, the Commission modified the arbitrator's decision without making any factual findings in support of it. We are unable to review a decision where the Commission has failed to make sufficient factual findings upon which its decision can be properly reviewed. Accordingly,

we vacate the decision of the trial court which confirmed the decision of the Commission, we vacate the decision of the Commission in its entirety, and we remand the matter to the Commission for further proceedings consistent with this order. Upon remand, the Commission shall make appropriate factual findings to support its determination of the appropriate permanent partial disability benefits to be awarded to the claimant.

¶ 36 Vacated and remanded with directions.